IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOUIE VALENZUELA-HERNANDEZ and SOFIA DANIELS VALENZUELA, Appellants, vs. UNITED STATES OF AMERICA, Appellee.	No. 21734 ✓ No. 21734-A

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

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I.

JURISDICTIONAL STATEMENT OF FACTS

On September 13, 1966, an Indictment was returned by the Federal Grand Jury sitting at Tucson, Arizona. (Item 24 of the Clerk's Record of the Transcript on Appeal, Volume I.) (Hereinafter Volume I will be referred to as "RC", the reporter's transcript will be referred to as "RT", the number following will refer to the page, and the number following "L" will refer to the number of the line. The Appellant, Louie

Valenzuela-Hernandez, will be referred to as Mr. Valenzuela, and the Appellant, Sofia Daniels Valenzuela, will be referred to as Mrs. Valenzuela.)

The Indictment charged that on or about September 2, 1966, Mr. and Mrs. Valenzuela, within the District of Arizona, did knowingly and with intent to defraud the United States of America, import and bring into the United States of America from the United States of Mexico, at Nogales, Arizona, approximately seven pounds and twelve ounces of marihuana, and approximately eight marihuana cigarettes, contrary to law, in violation of 21 U.S.C.A § 176a.

Mr. and Mrs. Valenzuela's arraignment was continued at their request from September 19, 1966, to October 3, 1966, at which time Manuel H. Garcia was appointed attorney for them. (RC Items 2 and 3.) Both pled not guilty (RC Item 24). Trial was set for November 22, 1966, and then continued to November 29, 1966 (RC Item 24). On October 24, 1966, their counsel moved for change of attorney for Mr. Valenzuela (RC Item 24), and on October 31, 1966, Ralph Seefeldt was appointed for Mr. Valenzuela (RC Item 4).

On November 29, 1966, Mrs. Valenzuela was ill and could not appear for trial. Mr. Valenzuela requested a continuance of his trial as well (RC Item 24).

On December 22 and 23, 1966, a trial of Mr. and Mrs. Valenzuela before a jury was held and the jury returned a verdict of guilty as to both Mr. and Mrs. Valenzuela (RC Items 6 & 7).

On December 30, 1966, both Mr. and Mrs. Valenzuela filed a Motion for New Trial based on the Trial Court's resentencing three defendants not connected with this case who were convicted of illegal re-entry (8 U.S.C.A., §1326), in the presence of the jury trial (RC Item 11).

On January 6, 1967, the Government filed its Memorandum in Opposition (RC Item 12).

On January 17, 1967, the Court denied the Motion for New Trial and sentenced Mr. and Mrs. Valenzuela to five years (RC Items 13 and 14).

On January 20, 1967, both Mr. and Mrs. Valenzuela petitioned the Court to appeal in forma pauperis, and the Court, on January 27, 1967, entered Orders granting the petitions (RC Items 17, 18, 19 and 20).

On January 24, 1967, Mr. Valenzuela's counsel filed a Motion to withdraw as counsel (RC Item 17). On January 27, 1967, Mr. Valenzuela filed his Notice of Appeal (RC Item 21), and on January 30, 1967, Mrs. Valenzuela filed her Notice of Appeol (RC Item 22).

This Court has jurisdiction of the appeal. 28 U.S.C.A., §1291.

II.

STATEMENT OF FACTS

On September 2, 1966, early in the morning, about 12:30 a.m., Customs Agents Horace Cavitt and Henry Washington were driving in Nogales, Sonora, Mexico and saw a white Corvette automobile parked in a well lighted area of Campillo Street about one block West from Calle Obregon (RT 99). The Corvette had two occupants who were later identified as Mr. and Mrs. Valenzuela (RT 99). Customs Agent Cavitt saw Jesus Gradillas, a Mexican taxicab driver and a narcotics dealer, near the Corvette (RT 100-103).

The Agents drove past the car and went South on Calle Obregon; they radioed to have a look-out posted on the Border (RT 103). They returned to the area, and the Corvette was still parked there, but was empty and no one was near it (RT 103 L 13-24). They drove around the block and the

Corvette then had three passengers and was moving; the occupants were Mr. and Mrs. Valenzuela and a man known to the agents as Tito, who is known as a narcotics dealer (RT 104 L 1-8). The Corvette was headed South on Calle Obregon (RT 105 L 9).

At about 1:30 a.m. the Corvette sought entry into the United States of America at the Grand Avenue port of entry with Mr. and Mrs. Valenzuela as sole occupants (RT 34 and 105). Customs Inspector Albert Alvarez took their entry. They both stated they had nothing to declare except a few small items (RT 35 L 5-6, and 37). A search was made of the vehicle by Customs Agents (RT 35 L 16-20). Seven pounds and twelve ounces of marihuana were found in the right front kick panel, and eight marihuana cigarettes were found under the driver's seat (RT 49). (The chain of custody and the testimony of the chemist will not be set out since there was no issue raised as to this evidence.)

The Defendants' case consisted of the testimony of Mr. and Mrs. Valenzuela. Mrs. Valenzuela testified they drove down to Nogales, Sonora, Mexico the afternoon of September 1, 1966 (RT 173). They stopped for toys and medicine and to meet with a bartender they had met twice before (RT 174), and then drove to the Amado Greyhound Park and remained there from about 8:15 p.m. until about 11:30 or 12:00 p.m. (RT 173). They returned to Nogales, Sonora, to the La Frotita Bar on Campillo Street and met Hector, the bartender, there (RT 176). She went out to the car and sat and read a magazine (RT 177-178). Her husband came out and moved the car across the street (RT 178-179). They both returned to the bar and had something to eat (RT 179). The bartender asked them for a ride home and they gave him one (RT 179-180). His home was up the street on which they were parked, i.e., Campillo Street; they did not drive on Calle Obregon (RT 179-180).

Mrs. Valenzuela testified that while she sat in the car reading a magazine, a taxi driver asked her about the wheels on their car (RT 181 L 1-5).

She testified that they declared the toys and vest, and forgot to declare a watch her husband had bought (RT 182-183).

On cross-examination she testified the Corvette was purchased by her husband for $2400.00 and that he worked at a car wash (RT 190). When shown the title to the car she stated the financing brought the cost of the car up to $3000.00 (RT 191).

She stated the purpose of returning to Nogales, Sonora was to sell Hector, the bartender, a portable record player (RT 192) for $10.00 (RT 200). She said that the bartender wanted them to keep it since he had no place to keep it, although it was the size of a hair dryer (RT 193). She testified Amado is 22 miles from Nogales (RT 193).

She was asked the route they drove the bartender to his home and if it took forty-five minutes. She stated it did not (RT 199).

Mr. Valenzuela testified he had worked as a car wiper and at pumping gas at a car wash in Phoenix for the last two and one-half years (RT 202). He purchased the car for $500.00 down and the balance was for $2900.00 plus interest (RT 203). He purchased the racing wheels from a customer (RT 204). He stated he heard his wife's testimony and that it was true (RT 205). He described the search at the border (RT 205-211).

On cross-examination he was asked how long had he known the bartender, and he replied "about a day" (RT 212 L 5-6), and that he had not been to Nogales before September 1, 1966 (RT 212 L 12-15). He testified they went to the Frotita Bar to eat and the bartender came up to them and

introduced himself and asked to buy a record player (RT 214 L 1-26). He stated they made the return trip from Amado to Nogales, an extra forty-four miles, to keep the record player safe for the bartender (RT 220). On re-direct he testified the right-hand window of the Corvette could not be closed (RT 221).

III.

OPPOSITION TO THE SPECIFICATION OF ERRORS RELIED ON

1. There was no prejudice to the rights of Appellants in the modification of the sentences of the three defendants not connected with this case in the presence of the jury panel.

2. There was no error in the admission of the testimony of Horace Cavitt.

3. There was no failure of proof of non-payment of import duty.

4. The search of Appellants' vehicle at the port of entry was not unreasonable and was not in violation of the Fourth Amendment.

5. There was sufficient evidence against both Appellants, and the Trial Court did not err in submitting the case to the jury.

IV.

SUMMARY OF ARGUMENT

1. There is nothing in the record to show the trial jurors were affected by the modification of the sentences of the three defendants not connected with this case.

2. The testimony of Horace Cavitt was material and competent testimony.

3. All of the elements of the offense were established by circumstantial evidence and direct evidence.

4. The search of Appellants' vehicle constituted a Border Search and therefore could be based on mere suspicion.

5. The Government's evidence, combined with the testimony of the Appellants, was sufficient evidence upon which to return a verdict of guilty.

V.

ARGUMENT

1. There is nothing in the record to show the trial jurors were affected by the modification of the sentences of the three defendants not connected with this case.

Both Appellants argue that the jury was affected by the Trial Court's having modified the sentences of three defendants for violations of 8 U.S.C.A., §1326, illegal re-entry. The Court placed them on probation.

They assume the trial jurors would return a verdict not based solely on the evidence as instructed (RT 264).

The Court, in considering the modification of sentence, stated:

> "THE COURT: But, since sentencing you, I have been troubled and I have still been thinking about you, you three men and the sentence that was given to you. You have not stolen any automobiles, as far as I know, and you have not stabbed anybody or brought narcotics into the country or anything of that nature."
>
> (Partial Transcript of Proceedings, P 6, L 1-6)

Both Appellants argued that this statement could lead the jury to believe the Trial Court thought the Appellants were guilty. Just how this statement could lead the jury to believe

that is not clear. This sentencing occurred at the morning recess of the first day (RT 30), and the jurors were told they could leave or remain (RT 30 L 15-18).

In *Braswell v. United States,* (5th Cir., 1952), 200 F.2d 597, as cited by Appellant Louie Valenzuela-Hernandez, that Circuit, at page 602, held that if acts are "within the range of a reasonable possibility" of affecting the jury then there must be a reversal.

It is respectfully submitted it cannot be reasonably inferred that the jury would be influenced by the Court's comment beyond the inference that the charge of importing narcotics (marihuana is a dangerous drug and not a narcotic) is a serious offense.

2. The testimony of Horace Cavitt was material and competent testimony.

At the trial Customs Agent-in-Charge Charles Cameron (RT 80-97) was called to testify prior to Horace Cavitt (RT 97-122). On the cross-examination of Cameron, Mr. Valenzuela's attorney asked if Cameron had personal knowledge of an innocent person having had marihuana placed in his automobile for transportation into the United States (RT 93 L 13-21). Direct examination was re-opened and Mr. Cameron testified to receiving a radio communication from Horace Cavitt, and as a result placing a "look-out" at the port of entry for a vehicle with a description of the two occupants, but with no license number (RT 95). On cross-examination Mr. Valenzuela's attorney asked how much he paid informants. There was no informant in the case (RT 96-97).

The testimony of Horace Cavitt as to who Jesus Gradillas was, was objected to as hearsay and the Court permitted it to stand as evidence as to the state of mind for the placing of the look-out on the occupants and the vehicle (RT 101

L 21 to 102 L 2). (The selling of narcotics by Jesus was of his own knowledge RT 111 L 19-24.)

Counsel cites the Court's ruling in denying Appellants' Motions for Judgment of Acquittal, but does not state it all:

> ". . . Now, isn't that a prima facie case with respect to both of them? No, we don't know how they got the marijuana. Could not the jury infer that they did it together unless they, by their defense show that, cast a doubt on the natural assumption that a jury would make, or could make, particularly if we add to the fact that they were both in the company of, at one time or another, two different men who were at least suspicious characters.
>
> "Now, there is no evidence that they got the marijuana from these men. We don't know where they got it or whether or not they got it, except for the fact that it was in the automobile that they brought into the country; and I think that's all we know. But it seems to me that a prima facie case has been shown that calls for these people to come forward and either tell how the marijuana got into the car or show circumstances under which it could be inferred someone, without their knowledge, put it in. When you have the problem that Miss Diamos brought out, people are not usually going to stow valuable marijuana in somebody else's car without their knowing about it." (RT 165 L 1-19)

The Government did not argue what Horace Cavitt saw, except *the time* he saw them driving South and Appellant Louie Valenzuela's time of crossing, i.e., 12:30 a.m. (RT 247 L 11-17).

In *Jones v. United States,* (D.C. Cir., 1962), 296 F.2d 398, the United States Attorney offered the evidence that the defendant, who was charged with first degree murder and who was offering the defense of insanity, stated at the time of his arrest he wanted a cigarette and to see an attorney. The

U.S. Attorney stated the purpose of this evidence was to show his sanity. In the argument the U.S. Attorney argued these facts as evidence of his coolness and premeditation.

Appellant Sofia Valenzuela's counsel argued that the testimony of Cavitt does not establish that they are narcotic peddlers (RT 240).

The Court, at the beginning of its instruction to the jury, stated:

> "THE COURT: Ladies and gentlemen of the jury, it now becomes my responsibility to give you the instructions that shall govern your deliberations. Before doing so, I might say, the Court has the prerogative as to the commenting upon the evidence. I seldom do this, but I do want to make one comment, particularly in view of some of the testimony yesterday. There was testimony by one of the agents as to the reason why he sent in this alert to check at the border, namely that he had seen the automobile here concerned and people they recognized as the defendants talking to one man first and then riding with another man, and he testified as to what he understood or what information he had indicated that these men were in some manner connected with narcotics. That testimony was admitted, not in any sense to prove that the two men concerned were narcotics peddlers or users or had anything to do with narcotics whatever, but rather because it was suspicion that their presence created in this agent's mind. In other words, that the agent had information to him indicating that these were narcotics peddlers. However, there is no proof whatever in this case that these two men, with whom these defendants were seen, actually were narcotics peddlers. That being the case, there is no proof in this case as to where the defendants got the marijuana if they did get the marihuana and if they did know it was in the car. This

is a matter for you to determine. The only comment I wish to make is that you must not conclude from any testimony in this case that it has been affirmatively proved that the men that were testified to having been in the company of these defendants actually were narcotics dealers." (RT 262 L 4 to 263 L 6)

It is respectfully submitted that the jury was instructed at the time the evidence was admitted and at the beginning of the Court's instruction as to the purpose of the admission.

3. All of the elements of the offense were established by circumstantial evidence and direct evidence.

Appellant Louie Valenzuela-Hernandez argues that the Government failed to prove that the Appellants did not have a license to import the marihuana and were never given the opportunity to show they had a permit.

The Government's evidence showed recovery of the bulk marihuana in the right front kick panel of the Corvette and the marihuana cigarettes under the driver's seat of the Corvette. There was sufficient circumstantial evidence of the possession of both Appellants. They were last seen headed South forty-five minutes before they attempted to enter the United States of America.

21 U.S.C.A., §176a, provides in part:
". . . Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

In *Butler v. United States,* (9th Cir., 1959), 273 F.2d 436, this Circuit stated at pages 438-439:

". . . There would be no purpose in creating such an evidentiary rule were it applicable only to marihuana proved to have been imported illegally. We refuse to follow Appellants' attempted distinction."

See also *Anthony v. United States,* (9th Cir., 1964), 331 F.2d 687, wherein this Court had before it a denial of a 2255 motion (28 U.S.C.A., §2255), which denial had upheld a conviction under 21 U.S.C.A., §176a based on constructive possession.

In the instant case neither Appellant declared the marihuana. Both Appellants took the stand and had the opportunity to explain the possession to the satisfaction of the jury. Their explanation was that they did not know the marihuana was in the car.

It is respectfully submitted there was sufficient evidence of the importation of the marihuana contrary to law as well as the other elements of the offense.

4. The search of Appellants' vehicle constituted a Border Search and therefore could be based on mere suspicion.

The search was conducted because of a "look-out" placed at the request of Horace Cavitt for what he saw in Nogales, Sonora, Mexico. It was not based on information from an informant.

Border searches may be based on mere suspicion. *Alexander v. United States,* (9th Cir., 1966), 362 F.2d 379, at p. 382. See also *Ernesto Gonzalez-Alonso and Jorge Gummersindo Valdelomar y Dorta v. United States of America,* (9th Cir., June 7, 1967), No. 21,462, at pages 4-5, of the slip sheet opinion for a resume of this Circuit's rulings.

It is respectfully submitted the border search was a valid search.

5. The Government's evidence, combined with the testimony of the Appellants, was sufficient evidence upon which to return a verdict of guilty.

Appellant Sofia Daniels Valenzuela argues there was not sufficient evidence as to her and that the Motion for Judgment of Acquittal should have been granted.

Since she offered evidence after the Government rested, she had abandoned her Motion made at the close of the Government's case. *Colella v. United States,* (1st Cir., 1966), 360 F.2d 792.

There was evidence of a joint operation. They were seen together in Nogales, Sonora, Mexico; neither of them declared the marihuana; she testified to an unplausible story of selling a portable phonograph to a bartender in Nogales, Sonora, and keeping the phonograph, which was no larger than a hair dryer, because he had no place to put it; and returning from the Amado race track, 22 miles away, to drive him home (see Statement of Facts), and when asked would it take forty-five minutes to drive the bartender home two miles away, she replied "No" (RT 198-199). She had no explanation for the forty-five minutes.

> "The Government's circumstantial evidence, combined with Appellant's false statements to Government agents, made a sufficient case for the jury."
> *Miguel Lamenca, Joseph Santos and Pedro Meza-Bustamonte v. United States of America* (9th Cir., July 17, 1967), No. 21,044, 21,045, and 21,046, at page 1 of the slip sheet opinion.

It is respectfully submitted there was sufficient evidence to find Appellants guilty of the charge.

VI.
CONCLUSION

There was sufficient evidence of the offense to find both Appellants guilty, and the marihuana was seized as a result of a border search, and there was no prejudice to the rights of the Appellants in the modification of the sentences of three other defendants, and the evidence of Horace Cavitt was admissible as to state of mind.

Respectfully submitted,
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I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.

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Three copies of the within Brief of Appellee mailed this 31st day of August, 1967, to:

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